

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
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No. 88-274

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID O. WILSON, Petitioner,

v.

ANNA M. HARELSON, et al., Respondents.

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

REPLY BRIEF

MICHAEL F. PERLIS  
(Counsel of Record)  
DEBORAH A. KLAR  
MARVIN K. ANDERSON  
101 California Street  
35th Floor  
San Francisco, CA 94111  
Telephone: (415) 434-4000

Attorneys for Petitioner  
DAVID O. WILSON

October 3, 1988

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## LIST OF PARTIES AND RULE 28.1 STATEMENT

The parties to the proceedings below were the petitioner David O. Wilson and the respondents Anna M. Harelson, Anna M. Harelson, Ph.D., Inc., Defined Benefit Plan, Louis Rigali and Julianne Rigali.

The respondent before this Court are Anna M. Harelson, Anna M. Harelson, Ph.D., Inc., Defined Benefit Plan, Louis Rigali and Julianne Rigali.

Petitioner David O. Wilson has no parent companies, subsidiaries, or affiliates to list pursuant to Supreme Court Rule 28.1.



## TABLE OF CONTENTS

	PAGE
LIST OF PARTIES AND RULE 28.1 STATEMENT. . . . .	i
TABLE OF CONTENTS. . . . .	ii
TABLE OF AUTHORITIES . . . . .	iii
REASONS FOR GRANTING THE WRIT. . . . .	2
I. The Factual Findings Of The District Court Do Not Satisfy The Solicitation -- Financial Benefit Standard of <u>Pinter</u> . . . . .	2
II. Contrary To Respondents' Assertion, The Factual Findings Of The District Court Apply To The Case As A Whole . . . . .	4
III. The Facts Respondents Recite In Opposition To Petitioner's Statement Of The Case Support The Rejected "Substantial Participation" Standard And Do Not Support The "Solicitation" Standard Under <u>Pinter</u> . . . . .	5
CONCLUSION . . . . .	9
APPENDIX	
APPENDIX V (Order of Court of Appeals . . . . .	A-58



# TABLE OF AUTHORITIES

## PAGE

### CASES

<u>Pinter v. Dahl</u> , _____ U.S.	
_____, 108 S.Ct. 2063	
(June 15, 1988). . . . .	passim

### STATUTES

§ 12(1) of the Securities	
Act of 1933, 15 U.S.C.	
§ 771(1) . . . . .	passim

### OTHER AUTHORITIES

Supreme Court Rule 22.5 . . . . .	1
Supreme Court Rule 28.1 . . . . .	i





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REPLY BRIEF

Petitioner David O. Wilson  
("petitioner") hereby submits this Reply  
Brief in compliance with Supreme Court  
Rule 22.5.

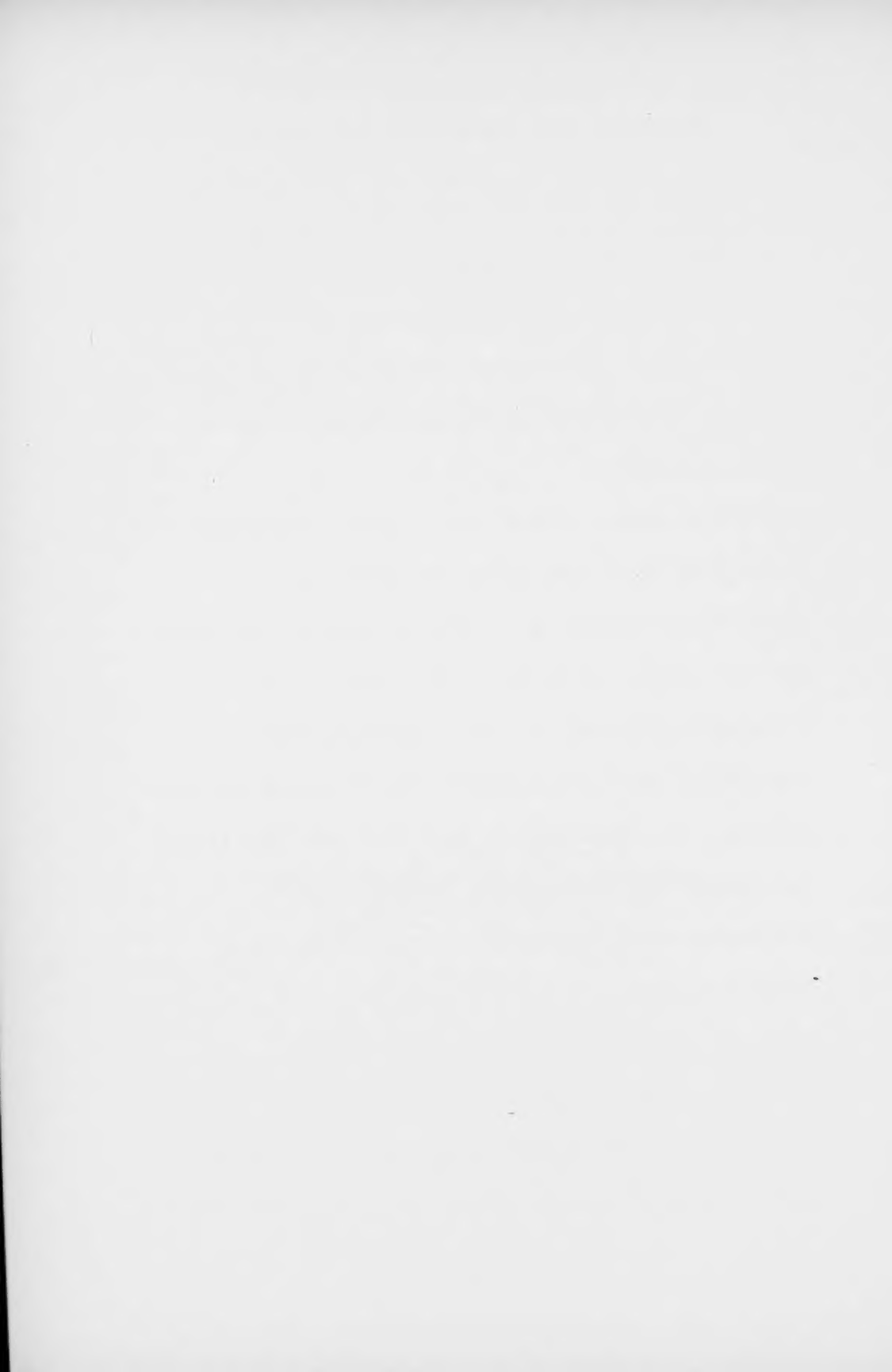


## REASONS FOR GRANTING THE WRIT

### I. The Factual Findings Of The District Court Do Not Satisfy The Solicitation -- Financial Benefit Standard of Pinter

The sole issue presented by the Petition For A Writ of Certiorari in this case is whether this Court's holding in Pinter v. Dahl, \_\_\_\_\_ U.S. \_\_\_\_\_, 108 S.Ct. 2063 (June 15, 1988), extends liability for the sale of unregistered securities under § 12(1) of the Securities Act of 1933, 15 U.S.C. § 771(1) ("Securities Act"), to a person who presented an investment opportunity at the request of the buyer, but did not solicit the buyer or recommend the purchase, although motivated by the promise of a commission.

In Pinter, there is no indication that the Court intended to construe the term "solicit" other than in its common and ordinary sense, that is, to refer to



the act of recommending or importuning. A finding of "seller" liability under § 12(1) of the Securities Act, must satisfy the "solicitation -- financial benefit" standard announced in Pinter. In applying that standard to the facts found by the United States District Court for the Northern District of California ("District Court"), there is little question that petitioner's activities fail to rise to "solicitation."<sup>1</sup>

The findings of fact of the District Court, alone, refute conclusively any suggestion by respondents that petitioner "solicited" the sale of unregistered securities. Significantly, these findings reveal that respondents approached petitioner and initiated the contact that led to their investment. Even the United

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<sup>1</sup> See Honorable Eugene Lynch's Memorandum Opinion dated June 3, 1986, Appendix III.



States Court of Appeals for Ninth Circuit acknowledged that petitioner did not personally seek out the respondents.<sup>2</sup>

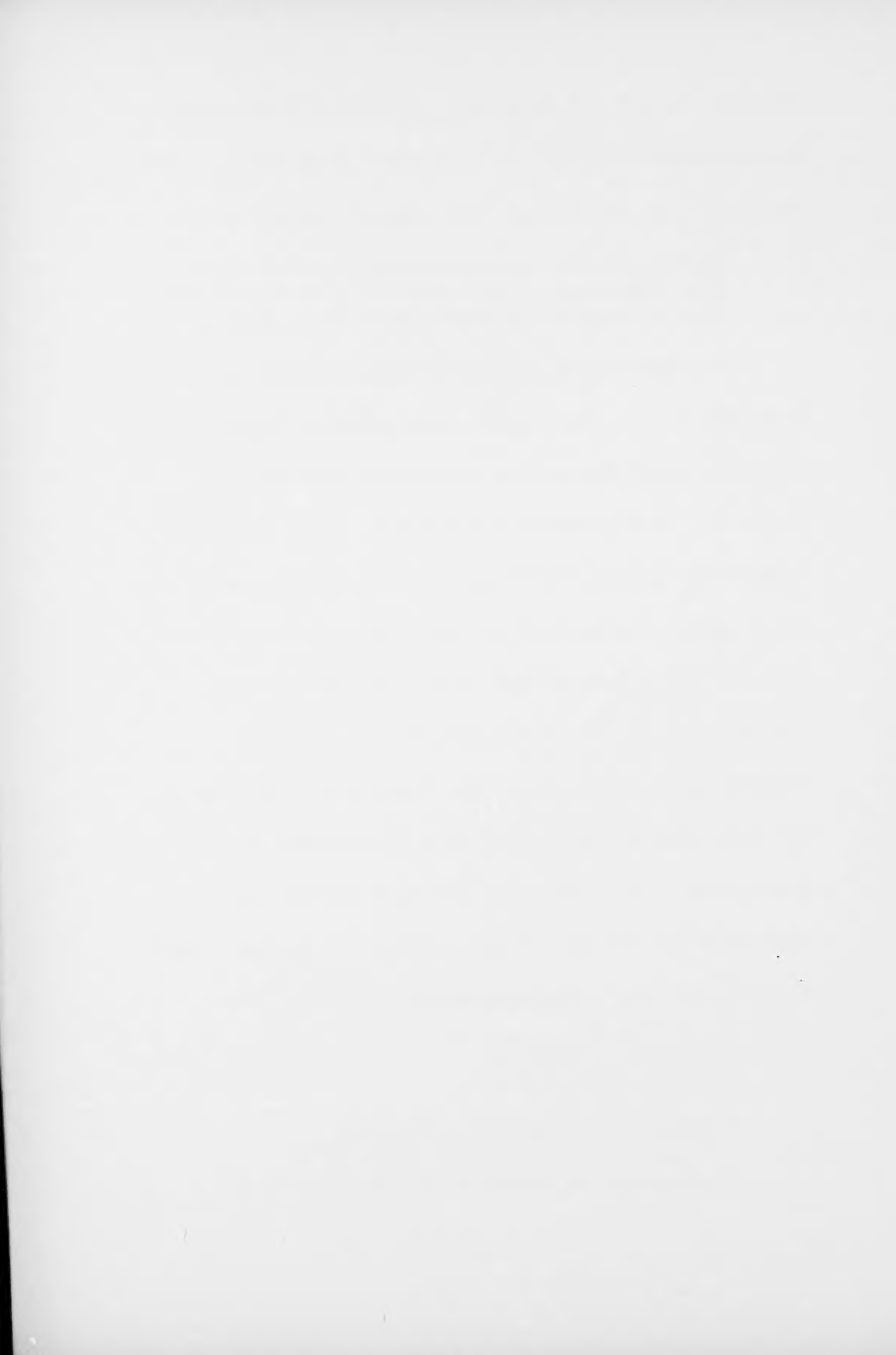
II. Contrary To Respondents' Assertion,  
The Factual Findings Of The District  
Court Apply To The Case As A Whole

Respondents dispute petitioner's Statement of the Case and assert that certain portions are unsupported by the record. Respondents suggest that certain District Court findings did "not appear to have been intended to have any bearing or effect on [petitioner's] liability for violation of section 12(1)."<sup>3</sup> This suggestion that certain factual findings of the District Court are findings for a discrete limited part of the case, and are applicable to no other part, is novel, but unpersuasive. Respondents cite to no

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<sup>2</sup> Appendix IV at A-55 and A-56.

<sup>3</sup> Response To Petition For Writ 3:34-37; 4:1.





authority for the proposition that certain findings of facts are limited to select portions of the District Court's opinion.

III. The Facts Respondents Recite In Opposition To Petitioner's Statement Of The Case Support The Rejected "Substantial Participation" Standard And Do Not Support The "Solicitation" Standard Under Pinter.

Respondents' specific objection to petitioner's Statement Of The Case consists of the following: "Wilson's assertion that he did not recommend the investment is directly contrary to the District Court's finding that Wilson was not merely a conduit providing routine services and that he engaged in a high degree of individual effort to sell the securities and was in actual contact with the [respondents]".<sup>4</sup> When these factual findings are examined

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<sup>4</sup> Response To Petition For Writ 4:1-6.



individually, not one supports a legal finding of "solicitation" under Pinter.

First, since petitioner did not "recommend" the investment, it is reasonable to infer that he did not urge, entreat or otherwise importune respondents to make the investment.

Second, petitioner's "high degree of individual effort to sell the security" relates specifically to the abrogated "substantial participation" standard, and as such it has no relevance to a finding under the Pinter standard that a person must "solicit" the sale of unregistered securities before § 12(1) seller liability may be imposed.

Third, petitioner's "actual contact with the [respondents]," consisting of two meetings arranged in response to respondents' telephone calls, is attributable entirely to the respondents' acts.



The presentation of an investment opportunity to a buyer, at the request of the buyer, by a person who neither recommends the investment or importunes the buyer to purchase the investment can not, and does not, under Pinter, rise to "solicitation" and merit the imposition of strict liability under § 12(1) of the Securities Act.

Although respondents advance purported factual arguments that buttress the District Court's holding that petitioner was a "substantial factor" in the sale of unregistered securities, the arguments are misplaced.<sup>5</sup> Respondents fail to satisfy the solicitation-financial benefit test of Pinter and fail to reconcile the District Court's finding that petitioner did not recommend the

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<sup>5</sup> See Response To Petition For A Writ of Certiorari 6:11-26.



investment.<sup>6</sup> Based on the above, petitioner respectfully submits that there can be no imposition of § 12(1) "seller" liability in the absence of any facts to support a finding of "solicitation."

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<sup>6</sup> On September 9, 1988, the Ninth Circuit granted petitioner's motion to recall the mandate, and separately, to enlarge the time to file a petition for rehearing and suggestion for rehearing en banc. A copy of the Ninth Circuit's order is attached hereto as Appendix V. The sole issue raised by petitioner in his petition for rehearing is whether the legal finding of "solicitation" in the Ninth Circuit's amended opinion in this case is supported by the factual findings of the District Court. Petitioner's Petition For Rehearing and Suggestion For Rehearing En Banc, already received by the Ninth Circuit, was ordered filed on September 9, 1988. In a separate motion to the Supreme Court of the United States, filed September 28, 1988, petitioner respectfully requests the Court to defer consideration of the Petition For a Writ of Certiorari until the Ninth Circuit disposes of the Petition For Rehearing and Suggestion For Rehearing En Banc.





## CONCLUSION

WHEREFORE, for the foregoing reasons,  
the Petition For A Writ of Certiorari  
should be granted. Petitioner  
respectfully requests that this matter be  
reversed and remanded to the District  
Court for appropriate disposition.  
DATED: October 3, 1988

Respectfully submitted,

Michael F. Perlis  
(Counsel of Record)

Deborah A. Klar  
Marvin K. Anderson  
101 California Street  
35th Floor  
San Francisco, CA 94111  
Telephone: (415) 434-4000

Attorneys for Petitioner  
DAVID O. WILSON

Of Counsel  
Pettit & Martin  
101 California Street  
35th Floor  
San Francisco, CA 94111



APPENDIX V

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ANNA M. HARELSON; ANNA M. )  
HARELSON, PHD., INC.; DEFINED )  
BENEFIT PLAN; LOUIS A. RIGALI; )  
JULIANNE RIGALI, )  
Plaintiffs-Appellees/ )  
Cross-Appellants, )  
 )  
v. )  
 )  
MILLER FINANCIAL CORPORATION, a )  
California corporation; )  
Defendant, )  
 )  
and )  
 )  
DAVID O. WILSON, )  
Defendants-Appellants/ )  
Cross-Appellees. )  
 )

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Filed September 9, 1988  
Cathy A. Catterson, Clerk  
U.S. Court of Appeals

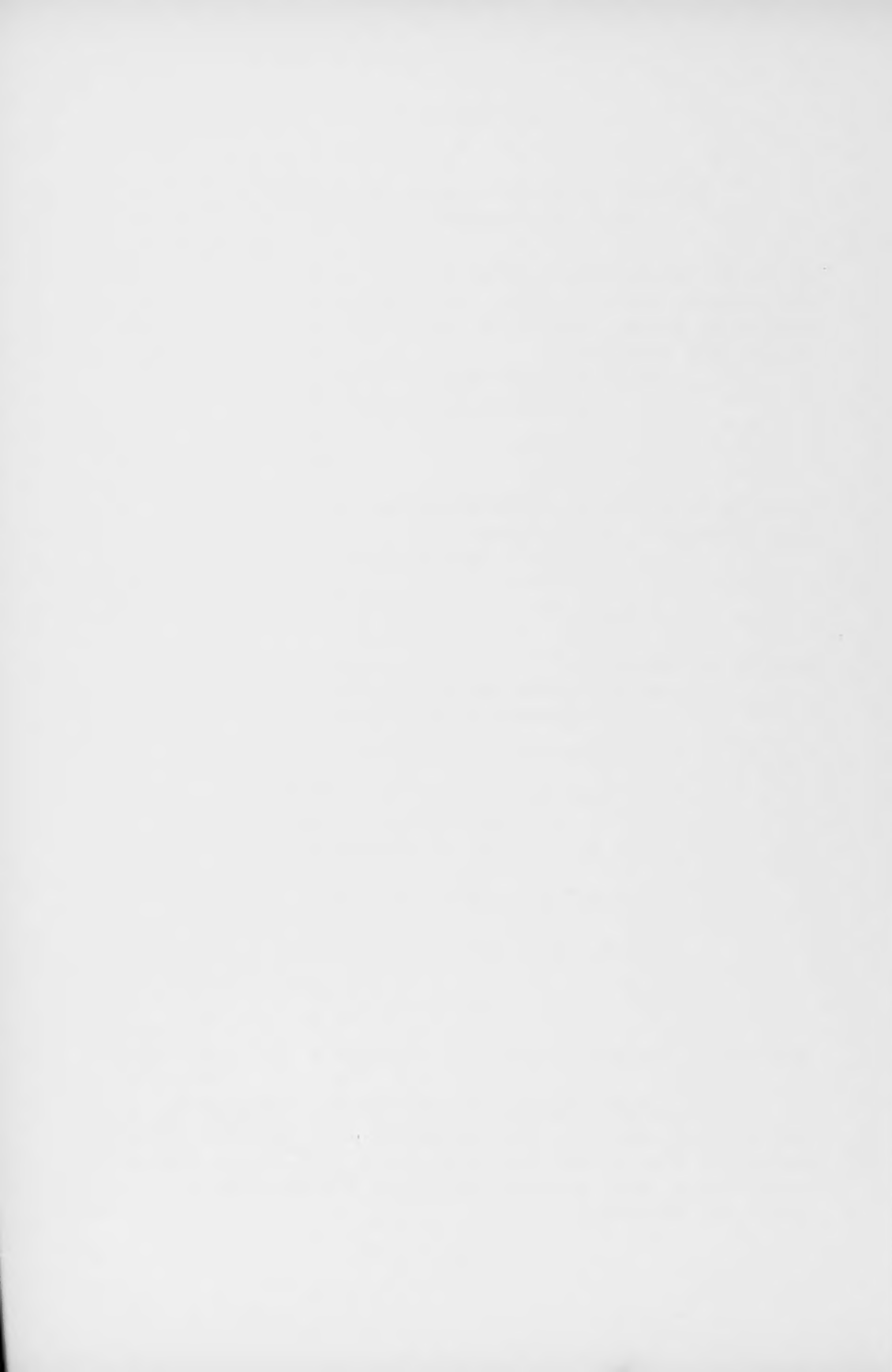
Nos. 87-1584; 87-1653

D.C. No. CV-84-4269-EFL

ORDER

Before: NOONAN, Circuit Judge

Defendant Appellee David O. Wilson's motion to recall the mandate and motion to enlarge the time for filing a petition for rehearing and suggestion for rehearing en banc is GRANTED.



The mandate is hereby recalled.  
Appellee's petition for rehearing and  
suggestion for rehearing en banc, already  
received, is ordered filed.